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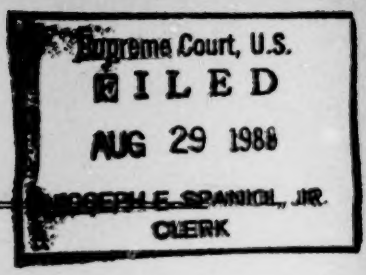

In The

Supreme Court of the United States

October Term, 1988

CHARLES T. WEAVER, GERALDINE WEAVER, KENTUCKY RIVER DEVELOPMENT CORPORATION, and C.T.&G., INC.

Petitioners,

v.

ANDERSON COUNTY FISCAL COURT, ANDERSON COUNTY PLANNING AND ZONING COMMISSION, and ANDERSON COUNTY BOARD OF ADJUSTMENTS,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

COUNTERSTATEMENT OF THE CASE

The Respondents do not agree with Weaver's statement of the case. This case has been briefed many times in the District Court and the Court of Appeals and each

time, as now, the facts are a major source of disagreement.

The District Court's Opinion recites many of the erroneous facts initially espoused by the Weavers, but upon a Motion to Amend the District Court conceded that the findings were improper on the Summary Judgment.

In the Court of Appeals, these factual disputes were made known to the Court and the Court of Appeals Opinion deletes any reference to the factual errors found in the initial District Court Opinion. Despite that, the Weavers again in their Petition for Certiorari present an erroneous recitation of the facts.

Although there was no trial in this case, there was a lengthy and complex record created in the District Court. That record contains a complete record of all of the administrative proceedings as well as lengthy pleadings, discovery and affidavits submitted at the District Court level.

The difficulty the Court may have in attempting to resolve this fundamental disagreement of the basic facts is a major reason for denying the Petition for Certiorari. Although a thorough review of the record will clearly establish that the facts are as the Anderson County agencies declare them to be, the difficulty of performing that review in order to begin the consideration of the legal issues presents a major reason for denying the Petition.

In any case, the facts leading to this dispute are as follows:

In the spring of 1985, Weaver presented to certain governmental agencies blueprint drawings showing the division of his 100-acre tract into 340 sites for mobile homes. His tract of land was located on the outskirts of Anderson County and, when developed, would function as a suburb of Frankfort and Lexington, two larger cities located in adjoining counties. Weaver also owned an adjoining 17-acre tract which was not shown on any blueprint. His subsequent testimony, unsubstantiated by any written contemporary documentation, was that he intended to develop this tract as a mobile home sales lot.

The plans for the mobile home park showed only 70 lots in what Weaver himself described as "Phase 1". Only lots in Phase 1 were shown to have the required water, sewers and other utilities. Phase 1 was laid out so that it could function as a self-contained and complete unit. The Board determined on the basis of ample evidence that Weaver had no present intention of developing beyond Phase 1 and that Phase 1 was an economically viable unit, so that its profitability did not depend upon development of the subsequent phases. Weaver had no intention of developing the other sections, unless Phase 1 proved to be financially successful.

There was never any governmental approval for construction of the entire 340-unit development. Plumbing hookups for the first phase were approved by the division of plumbing. A permit purportedly issued by the Department of Health was presented in evidence by Weaver, but it was discovered to have been backdated and signed by a person who had no authority to sign it. No blueprints, drawings or plans reflecting the sales lot on the separate 17-acre tract were ever presented to any

governmental agency for approval, nor were any such plans ever drawn up.

During this same period, General Motors was looking for a location for its proposed new Saturn plant. Anderson County was hopeful that the plant would locate in Anderson County and in anticipation of that, hearings were held in the summer of 1985 on the implementation of county-wide zoning. The new zoning ordinance was enacted on September 1, 1985.

At that date Weaver had spent a substantial sum pursuing the construction of Phase 1, the 70-unit section of the development. However, at that date there were no mobile homes located anywhere on the property and none of the sites were ready to accept such residential units. In addition, no mobile homes were located on the separate 17-acre tract, although one mobile home may have been ordered for the purpose of serving as a sales office.

Kentucky law requires zoning regulations to be applied uniformly throughout the jurisdiction. Everyone in Anderson County was required to abide by the zoning laws and the procedures established thereby unless exempted as a pre-existing use. Expansion of pre-existing uses is prohibited. Claims of exemption as a result of pre-existing uses must be carefully scrutinized by the Anderson County Board of Adjustments.

This proposed mobile home park would have a significant effect upon the public interest in Anderson County. If fully developed, it would house relatively large numbers of school-age children who would require a significant amount of busing to get them to and from

schools located a substantial distance away. Also, because this would be a bedroom community of larger cities located in other counties, tax revenues to Anderson County from the development would be disproportionately small. The proposed development was contrary to good land use planning which would require such dense residential developments to be located in close proximity to schools and other sources of county services.

Kentucky law provides a procedure for any landowner whose proposed use is prohibited by the applicable zoning district to seek rezoning to a different district which would allow his proposed use. Weaver never sought rezoning for any of his property. However, there was a good probability that rezoning of the area beyond Phase 1 would have been favorably considered by the zoning authorities. Because of this, application of the zoning regulations to Weaver's property except for the 70-unit in Phase 1, did not deprive that property of all economic value, and, in fact, it had a substantial amount of economic value even with the application of zoning.

On the basis of these factors, the Board determined that Weaver's claim for an exemption from zoning regulations as a grandfathered pre-existing use was valid only for Phase 1 and that the remainder of his property would be subject to the zoning regulations and procedures that were applicable to all other land in Anderson County.

Kentucky law provides for an appeal through the state court system from any decision of the Anderson County Board of Adjustments. It also provides for an action for inverse condemnation if there is found to exist a "taking of property without just compensation." The

appeal and the inverse condemnation action could be pursued in state Circuit Court simultaneously.

These facts are in accord with the findings of the Anderson County Board of Adjustments and they are supported by substantial evidence contained in an ample record created by the trial-type proceedings that occurred before the Anderson County Board.

Kentucky law gives preclusive effect to the findings of the Anderson County Board of Adjustments in absence of an appeal taken from that decision. Weaver took no appeal from that decision and the Board's findings preclude any State court from entertaining contrary factual or legal representations. However, the preclusive effect of the Board's decision is contrary to the District Court's Opinion and the Court of Appeals did not rule on this issue.

Because of the danger that the Court might be misled by some of the erroneous factual statements made in the District Court's Opinion, it is worth repeating that at the hearing on the Motion to Amend and Vacate the Judgment, the District Court conceded that many of the facts recited in its Opinion were not appropriate for Summary Judgment. The following is a list of matters that are contrary to the District Court's Opinion but are nevertheless required to be considered in the Respondent's favor because of the posture of this review.

1. The Plaintiffs did not obtain a permit from the State Health Department prior to the adoption of the zoning regulations on September 1, 1985.

2. No governmental agency has ever approved construction of the entire 340-lot development or the 17-acre commercial sales lot.

3. The Plaintiff's financing was not jeopardized by the efforts of the zoning authorities.

4. The roads and sewer plan had not been constructed September 1, 1985.

5. Weaver had not proceeded from the beginning to construct to 340-unit mobile home park and the 17-acre commercial sales lot as a whole, but rather had planned to proceed with the construction in phases with each subsequent phase being dependent upon the success of the prior one.

6. The commercial sales lot is not reflected on any drawings related to the development of the mobile home development and the two projects were conceived separately and, though complementary, were not entirely dependent upon one another.

7. Phase 1 of the project was an economically viable unit.

8. The Board did not waive the subdivision regulations for any of the project beyond Phase 1, the 70-lot section.

SUMMARY OF ARGUMENT

This is a land use regulation dispute. Weaver began developing a mobile home park about the same time Anderson County Fiscal Court passed its new zoning

ordinance. Weaver claimed to be grandfathered so as to be exempt from the zoning ordinance. The Anderson County Board of Adjustment determined that only a portion of the mobile home park was grandfathered, so Weaver pursued a claim for a Civil Rights violation.

Weaver now concedes that because post-deprivation remedies exist under state law and because he could have sought rezoning under the administrative process, he has no claim for a "taking of property", *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985). However, while conceding he has no "taking of property" claim, Weaver says he was "deprived of property without substantive due process of law."

The Court of Appeals held that the Supreme Court's pronouncements in *Williamson County* also precluded Weaver from making a valid claim for a violation of substantive due process. Weaver's Petition for Certiorari attempts to draw (without clearly articulating) some sort of esoteric distinction between a taking claim under the Fifth Amendment and a deprivation of property claim under the Fourteenth Amendment. As the Sixth Circuit determined, the Supreme Court has already ruled in *Williamson County* that considerations of post-deprivation remedies and ripeness apply to the situation regardless of the name given to the claim. The Petition for Certiorari presents no justification for asking this Court to reverse the position it so recently and so clearly took in *Williamson County*.

The Respondents are the local governmental officials who have been sued by Weaver for trying to administer

the local zoning regulations. These Respondents request that the Petition for Certiorari be denied.

ARGUMENT OF LEGAL ISSUES

While many of the facts related in this Response are important to demonstrate the good faith and fairness of the decision of the Anderson County Board of Adjustments, they are not necessary to sustain the decision of the Sixth Circuit Court of Appeals requiring a dismissal of this action. The Sixth Circuit's decision is compelled by this Supreme Court's pronouncements in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 195 S.Ct. 3108, 87 L.Ed.2d 126 (1985). That case discusses at length two critical elements that are involved in this action: both relate to "ripeness"; one concerns the availability of administrative procedures which could negate or ameliorate the restrictiveness of the existing regulations and the other concerns the existence of "post-deprivation remedies" for compensation under State law.

The Sixth Circuit found that Weaver's cause of action was not ripe because he had available to him administrative remedies which could provide all or partial relief from the restrictions imposed by the existing zoning. The administrative remedy would be in the form of an application by Weaver for rezoning pursuant to KRS 100.211, the statute which sets up this routine, administrative procedure. The standards for determining whether a rezoning application should be approved are set out in KRS 100.213, which requires conformance to the community's comprehensive plan or good justification for not

conforming to the comprehensive plan. The decision of the Anderson County Board of Adjustments notes that there is good probability that such an application would be favorably considered by the zoning authorities. Until such an application is attempted and acted upon by the zoning authorities, there is no way of determining the impact that the Anderson County Zoning Regulations have on Weaver's property.

In *Williamson County* the developer had obtained approval of a preliminary plat for a large residential development. Upon approval of the preliminary plat, the developer conveyed to the county a permanent open space easement for a golf course and began building roads and installing utility lines for the project at a cost of more than $3.5 million.

During the course of the development the local zoning regulations were amended, decreasing the allowable density for residential developments. The developer filed suit in Federal Court claiming that he should not have been subjected to the new standards because he had obtained preliminary approval of the entire development under the old standards.

The Court in *Williamson County* held that the developer had not established any present harm protected by the Constitution because he had not applied to the zoning officials for a final decision establishing the full extent of his rights under the new regulations. In *Williamson County*, the administrative procedures for relief were referred to as "variances".

Weaver attempts to make a mountain out of the fact that the Court of Appeals referred to the administrative

relief as a "variance" and that Kentucky law narrowly defines the term "variance" so that this relief under Kentucky law would not provide Weaver with any significant remedy. Weaver's argument is a mere molehill. The Sixth Circuit was not using the term "variance" to refer to the Kentucky procedure. Rather, it was using the term in the generic sense that is suggested by the *Williamson County* decision to refer to any administrative relief from the existing restrictions. The administrative relief is clearly available to Weaver under KRS 100.211, but thus far he has failed to pursue it.

This is not a requirement that administrative remedies be exhausted, rather it is an essential element in clearly determining the impact of the regulatory scheme upon Weaver's property. *Williamson County, supra,* 105 S.Ct. 3120.

Weaver argues that considerations of ripeness only apply to a "taking" case. He says they do not apply to a "substantive due process" case. This position is clearly contradicted by the language of the Supreme Court in *Williamson County,* where the Court states:

> "Even if viewed as a question of due process, the Respondent's (property owner's) claim is premature." 105 S.Ct. 3108, 3123.

In analyzing the developer's "substantive due process" claim under Section 1983, the Court in *Williamson County* noted that the critical question is whether the regulations "go too far." It went on to say:

> "As we have noted, resolution of that question depends, in significant part, upon the analysis of the effect of the commission's application of the zoning ordinance and the subdivision regulations on the

> value of respondent's property and investment-backed profit expectations. That effect cannot be measured until a final decision is made as to how the regulations will be applied to respondent's property. No such decision had been made at the time respondent filed its Section 1983 action, because respondent failed to apply for variances from the regulations."

It is clear from the above that what the Court is concerned with is the impact of the regulatory scheme upon the investment-backed expectations relating to Weaver's property. That impact cannot be determined until Weaver has pursued the administrative procedures provided for changing the zoning. As the Board noted there is a good probability that such change request would be approved. It cannot be determined what, if anything, Weaver has been deprived of without "substantive due process" until the available administrative procedures have been pursued and acted upon as allowed by the regulatory scheme.

The Court of Appeals also determined that the action must be dismissed because state law provides Weaver with adequate post-deprivation remedy of inverse condemnation.

In *Williamson County* the Court noted that

> "A second reason the taking claim is not ripe is that the respondent did not seek compensation through the procedures the state provided for doing so.
>
> * * *
>
> If the state provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." p. 105 S.Ct. 3121.

Further, at footnote 13 the Court states:

> "The nature of the constitutional right therefore requires that a property owner utilize the procedure for obtaining compensation before bringing a 1983 action".

Weaver has not pleaded, proved or even argued the inadequacy of Kentucky's inverse condemnation remedy prior to this time. Nevertheless, *Williamson County* makes clear that the inadequacy can only be demonstrated by the attempt to utilize it and having compensation denied. Having failed to even attempt to utilize the remedy of inverse condemnation, Weaver cannot be heard to argue its inadequacy to fully compensate for any alleged deprivation of property.

Although the Court's pronouncements in *Williamson County* relating to post-deprivation remedies are most specifically made in connection with its analysis of the "taking" claim, the Court subsequently equates the taking claim with the substantive due process claim. The regulation of property creates a substantive due process claim if the regulation "goes too far". This is precisely the same way a "taking" is defined in the leading case of *Pennsylvania Coal Co. v. Mahan*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922). There, the Court said:

> "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." 260 U.S. 415, 43 S.Ct. 160.

In *Williamson County*, the term "too far" is defined for purposes of substantive due process as follows:

> "The point at which regulation becomes so onerous that it has the same effect as an appropriation of property through eminent domain or physical possession."

Consequently, as regards restrictions imposed on property, the *Williamson County* case effectively equates the taking claims with the substantive due process claims.

CONCLUSION

As compelled by *Williamson County*, the Sixth Circuit determined that Weaver's claims were premature, not ripe. Under State law Weaver may seek rezoning and he may seek inverse condemnation if, after the rezoning procedures, the restrictions still go too far. However, he has no claim for a Civil Rights violation until he has pursued those procedures provided for by Kentucky law and until those procedures have been found to be inadequate. All of this is very clear from a close reading of the *Williamson County* case and there is no reason to grant certiorari in this action simply to restate what has already been said in *Williamson County*. The Respondents respectfully request that the Petition for Certiorari be denied.

Respectfully submitted,

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